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In the

Supreme Court of the United States

UNITED AIR LINES, INC.,

PETITIONER,

V.

LIANE BUIX MCDONALD,

RESPONDENT.

No. 76-545

Washington, D. C.
March 29, 1977

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED AIR LINES, INC.	:	
Petitioner,	:	
v.	:	
	:	No. 76-545
LIANE BUIX McDONALD,	:	
Respondent.	:	

Washington, D. C.,

Tuesday, March 29, 1977

The above-entitled matter came on for agument at 1:14 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STUART BERNSTEIN, ESQ., 231 South LaSalle Street, Chicago, Illinois 60604; on behalf of Petitioner.

THOMAS R. MEITES, ESQ., 33 North Dearborn, Suite 920, Chicago, Illinois 60603; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-545, United Air Lines against McDonald.

Mr. Bernstein, you may proceed whenever you're ready.

ORAL ARGUMENT OF STUART BERNSTEIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BERNSTEIN: Mr. Chief Justice, may it please the Court:

The -- this case arises generally out of the same no-marriage rule which we had occasion to examine in the Evans case but presents an entirely different question.

The question here is the status of unnamed class members after denial of class by the District Court.

This case is a corollary of American Pipe & Construction Company v. Utah, 414 U.S. 538, decided by this Court in 1974. Because we rely so heavily on American Pipe, I wish you to indulge me to briefly state the circumstances there.

In American Pipe, a class action was filed eleven days before the statutory period would have otherwise expired. The District Court ultimately denied class status on the basis of numerosity some nine months after the suit was filed, and leaving eleven days left for the statutory period to run, inclusive, I suppose.

Within eight days, a number of intervenors came in, attempted to intervene, and the District Court held intervention was untimely because, since class had been denied, the tolling which had occurred on the filing of the suit was retroactively untolled, and since the eleven days had long since expired, they were late.

The intervenors then appealed the denial of intervention. It ultimately came to this Court, and the Court held that on the filing -- examined the practice under Rule 23 prior to the 1966 amendments, one-way intervention problems and matters of that kind, and then stated as a general rule that when a class action is filed, it tolls the time limitations for all unnamed potential class members -- whether they were aware of the suit or unaware of the suit was a matter of indifference; but that the tolling continued only until the motion to strip the suit of its class action character was decided; and that since that decision was made --

QUESTION: So it was granted?

MR. BERNSTEIN: The Court put it in terms of denied, sir. Because it had been denied.

QUESTION: The motion to strip the suit of its class action character was granted.

MR. BERNSTEIN: Class status was denied, yes.

QUESTION: And class status denied, consequently denied.

MR. BERNSTEIN: I had a double negative there, and forgive me, sir.

QUESTION: Yes. But it wasn't until it was decided that they had to be --

MR. BERNSTEIN: That's correct. And class action having been denied, the statutory period began to run again but since they had come in within eight days, they were timely, and the interventions were allowed.

In the case here, Miss McDonald has come in three years after class action was denied, in fact, after the final orders of dismissal upon which this suit was settled.

Since the circumstances out of which the particular instance arises here, I'm going to briefly recapitulate the history of the immediate litigation which gave rise to this case.

QUESTION: Before you begin on that, how much time, under the general rule of American Pipe, how much time remained after the denial of class action status, how much time under the applicable statute limitation?

MR. BERNSTEIN: Yes, sir. They -- it's our position that there were 62 days left.

QUESTION: 62.

MR. BERNSTEIN: Because -- and here's the mathematics on that: at the time the suit was filed, it had to be filed within 30 days -- get my times right, yes --

30 days of receipt of the sue letter was filed two days short of the expiration on that date, plus there were two days left.

By the time class was denied, the statutory period had been enlarged to 90 days. And so we are deducting the 28 days from the 90 days, which leaves a net of 62 days that were left, on our theory, for Miss McDonald to have acted.

QUESTION: Mr. Bernstein, will you comment somewhere in your argument on what seems to me some difference between American Pipe and this case in that American Pipe all the courts assumed that the District Court's denial of class certification was correct; that was not challenged. And here the 7th Circuit reversed the denial of class certification.

MR. BERNSTEIN: Yes, sir, I will get to that, and I think that is a critical point. Because in our view, the 7th Circuit had no power. And power is its term, not mine. I believe the 7th Circuit had no power to decide that question, because it didn't have a party before it. It first had to decide whether intervention was proper before it could get to that question.

And I will subsequently argue to the court that the basis upon which the Court of Appeals decided that intervention was timely was improper. But the way

the Court proceeded was to say, we hold that intervention was timely here because it wasn't until after the final dismissal of this case that Miss McDonald knew that the main plaintiffs were not going to appeal class. Therefore, it's timely. Now, we find it timely; therefore we have the power to examine the question of class. We say it's just the other way around.

The District Court held that intervention was untimely, coming this late. And that should have ended the case, in our view, and never gotten to the second point.

There were two notices of appeal filed: one on denial of intervention, and one on the class question. And our point was that once -- you should have gotten only to that first one, the proper decision should have been that it was not timely; coming in three years late was not timely. And therefore we never get to the second point.

But I would like to develop that through the history of this litigation if I may, please.

As I indicated earlier, it was November of 1968 that United terminated the no-marriage policy. Two weeks later, a suit was filed against it, the Sprogis suit, also referred to in the course of the Evans argument. It was an individual action brought by Mrs. Evans -- Mrs. Sprogis on her own behalf, claiming that the policy was a

violation of the sixth discrimination provisions of Title VII. The District Court granted summary judgment in favor of Mrs. Sprogis. The Court of Appeals affirmed it in a two to one decision; the dissent was by Judge Stevens.

This Court denied certiorari sometime in 1972.

While these appeals were pending, while the appeal was pending in the Sprogis case, another suit was filed by the same counsel, making the same allegations, but now it was a class action.

This was the Romasanta case. And there was alleged that all stewardesses -- the class would consist of all stewardesses who had been discharged under this policy, and that the class numbered some 27 or 28. These are the allegations in the record -- in the complaint and in the record before you.

The Court held this on the past-case calendar pending the result of the appeal in the Sprogis case, which was then up before the 7th Circuit. When Sprogis was decided by the District Court, the counsel for Mrs. Sprogis asked the District Court to, at that point, make a class action out of it; that is, after the decision on the merits ask Sprogis, which had been started as an individual case, be converted into a class case. And that was one of the issues on appeal, whether after a decision on the merits, an individual action could be converted to a class action. The Court of

Appeals said that the District Court had the power to entertain such a motion, but should be mindful of the principles of Rule 23.

And on remand then, Romasanta , the class action case, Sprogis, the remanded individual case on conversion to class, motions were made to consolidate those two cases by joint -- as I say, by joint counsel.

We resisted the motion to consolidate, and the motion to convert Sprogis into a class action. And the Court granted our motion, and did deny class relief in the Sprogis case. There were no attempted interventions at that time. Consolidation was denied. Sprogis was referred to a special master for a determination of a back pay award. And ultimately Mrs. Sprogis was granted some $10,000 in back pay.

She had, incidentally, been back to work early in 1969; shortly after she filed her suit, she was offered employment with seniority and she did come back to work.

It's clear she had filed a timely charge under the Act. There's no question of timeliness connected with that whatsoever.

The Sprogis case appealed, but not under denial of class action. It was appealed under denial of attorney fees. The District Court refused to allow attorney's fees in the case because of what it felt was some impropriety

in the sponsorship of the litigation. There's no relevance to this case, and no need to pursue that. But attorneys fees were denied.

There was a cross-appeal on the question of the measure of damages and back pay. What duty did the discriminatee have to mitigate? And the Court had held that the burden was on United Air Lines to prove that there was not due care exercised in mitigation rather than on the discriminatee to prove that in fact an attempt had been made to mitigate.

Well, all that held up the proceedings in the Romasanta case. When that was all out of the way, then the Court -- we filed a motion to strike the class action allegations in the second case, the case, and in December 6th, of 1972, Judge Perry did grant our motion: struck the class action generally on a theory that since this time had passed, and that since it was not possible to know whether a stewardess who resigned -- was terminated -- did so because of the rule or despite the rule, and there was evidence as I had indicated earlier that many employees quit their employment, or waited for discharge in any event, and that it wasn't necessarily because of the rule, but because of marriage.

He found that there had to be some manifestation on their part that they really were interested in continued

employment. And so he limited the class to those who had filed grievances, or had taken some action before the commission, the federal commission, the EEOC, or before some state agency -- the New York Civil Rights Commission, the Illinois Fair Employment Practices Commission, and so on.

He then allowed -- he entertained intervention -- petitions to intervene -- by 25 intervenors. And he granted the intervention petitions of 13, and denied them as to the others.

One of the other factors was that a number of the stewardesses had settled their claims, entered into settlement agreements with United. He said they were bound by those. Others had instituted litigation in other courts, and he didn't permit those to come in.

So he held the class to be a narrow one, and based on that holding, said that numerosity failed, and therefore intervention would be allowed. And as I say, 13 intervened, 12 were disallowed.

There were not attempts to appeal the denials of intervention.

QUESTION: But class certification was denied them on the grounds that the identifiable plaintiffs were sufficiently small in number that a class action wasn't warranted?

MR. BERNSTEIN: That's correct.

There were no attempts to appeal the denial of intervention in that case. Counsel for plaintiffs did attempt a 1292(b) permissive appeal for the denial of class, and that was denied.

But that appeal was by the named plaintiffs, not by the intervenors who had been not allowed to intervene, with respect to whom the case was over and the order was final, and to whom --with respect to whom an appeal would not have been interlocutory.

No attempt at that time was made by Miss McDonald to intervene.

Well, then counsel for both sides entered into settlement discussions. They had some 13 intervenors, two main plaintiffs at that time, and they tried to settle up their differances.

There was no question then about the liability. That had already been settled in Sprogis in '71. The only question was, how much back pay? And again, most of the reinstatements had been cleared out because of the earlier tender.

Finally, in December -- in October 2 of 1975, three years later, an agreed order of settlement was arrived at between counsel for both parties; back pay was agreed upon; and an order was entered by the court, dismissing

the case with prejudice, reciting that the settlements had been agreed upon and that there were no further claims to be adjudicated. And as I say, the case was dismissed with prejudice.

It was two weeks after that that Miss McDonald first appeared. Now this would have been seven years after she was terminated; five years after the case started; and three years after class action was denied.

She submitted an affidavit at that time saying that when she was terminated in September of 1968, she didn't do anything in her own behalf because she knew other people were doing something about it, and she was relying upon them.

Mr. Justice Rehnquist referred to the extraordinary foresight which might have been present in his questioning of Mr. Castler earlier. But here was a great bit of foresight. Because at that time, in September of 1968, this Court hadn't decided in the Albemarle case that class action was appropriate for back pay. The only decision in the area at that time was an August, 1968, decision of the 5th Circuit, Oatis v. Crown Zellerbach, which said you could have class action for reinstatement, injunctive relief, but not for back pay.

So this was great prescience that was exercised by Miss McDonald in September of 1968 to do nothing on her behalf, and rely on other people.

And as I indicated, the first suit filed, two weeks later in November of '68, was an individual action, not a class action. Class action didn't come until 1970.

Well, now, what is the application in this circumstance of the principles of American Pipe? It is our position that when the Court denied class in June of 1972 -- excuse me, sir, in December of 1962 -- at that time, it was incumbent upon Miss McDonald to act.

Her affidavit says she knew that the Court had denied class, and her affidavit says, I knew I was excluded from this case. But she took no action.

It is our position that when those 62 days ran out, that she was time-barred. That if she wanted to get into this case, she should have acted within that period. She should have asked the District Judge to modify the order, his ruling on the class motion, if it wasn't suitable to her. He has the power to modify. In fact, he said, when she came in three years later, why didn't she come in here earlier, why didn't she ask me to modify the order, why didn't she appeal at that time if she disagreed with me? He said, litigation must end.

QUESTION: Then your position, necessarily, would require persons having claims to flood into the District Court at that time?

MR. BERNSTEIN: Our position is that once class is

denied, than an individual who now is no longer part of the class has to protect himself by what other means are available. He's not part of that case.

QUESTION: Well, one means is to wait for the main parties to take an appeal from the denial of the class certification.

MR. BERNSTEIN: Yes, but the main party may not do so, sir. There's no compulsion on the main party to do so.

QUESTION: No, but that's a risk he takes.

MR. BERNSTEIN: It's a risk.

QUESTION: And if he stands by and there is an appeal taken, he benefits by that appeal.

MR. BERNSTEIN: That's correct.

QUESTION: All I'm saying is, that doesn't your position mean that these intervenors must flood into the Court and bury it under a flood --

MR. BERNSTEIN: But look at the contrary.

QUESTION: -- of intervenors. Do you want that? Rather than the other.

MR. BERNSTEIN: Mr. Justice Blackmun, look at the contrary results. If you say, that you can wait as long as you waited here, and then do that very thing, it seems -- it would seem to me that in terms of management of class actions, the problem that a trial court has --

QUESTION: And also -- it isn't the very thing -- well, I ask: is it the very thing? Isn't what she wants here the ability to appeal the denial of the class certification, not to intervene?

MR. BERNSTEIN: And the question is -- yes, sir. The question is whether she comes in too late to do that. That's the question.

See, we concede that had the case not been settled as the main plaintiffs stood on their -- gone to trial and had an order on the merits, that they could have appealed. But they put themselves in a position, because of the settlement, where they no longer could appeal. And counsel conceded that in open court. He said, having settled this, we're in no position to take the appeal.

QUESTION: You mean all the members of the class have to individually appeal?

MR. BERNSTEIN: No, sir. At the time of intervention one class member, one of the unnamed class members, intervening at that time, could have done it. That's all it would take.

QUESTION: Could he have saved the whole class?

MR. BERNSTEIN: Had they intervened timely, in 1962. Had they intervened in 1962. Because if you play this out with what would have happened then, they came in shortly after -- let's suppose they came in within the 62

days after the class was denied. They say to the judge, your honor, we'd like you to reconsider your ruling on the class. We think it ought to include us. He says, yes. Then they're in. He says, no, I think not. Thatis a final order. They can appeal.

That's precisely what happened in American Pipe. That's how the appeal came up in American Pipe before the final order; denial of intervention is a final order with respect to the party.

QUESTION: You can -- a person can move to intervene in a lawsuit that's been dead ten years. And the District Court is going to say no. And that person has a right to appeal from that denial of intervention. The answer is going to be affirmed. But he nonetheless has a right to appeal.

MR. BERNSTEIN: Excuse me, sir. Then I misunderstood the question. Of course he has the right to intervene, attempt to intervene. And the court has a right to rule on it. And he has a right to appeal that. No question about that.

But then the question is, what standards does the Court of Appeals apply in determining the propriety of the District Court's action in denying intervention.

QUESTION: And the question is also whether in his effort to intervene late, that person can raise any other issues by virtue of the fact that the case has been dead so long.

MR. BERNSTEIN: Well, that presents an interesting question here. Because you heard Mr. Levin say in the Evans case something about her possibility of getting into the McDonald class. This really illustrates the problem. In McDonald, the class asked for in this instant case was of all discharged stewardesses; I'm told the class was some 27 or 28. During the course of that proceeding, the class asked for was all discharged stewardesses, and all those who resigned under protest, by making some form of protest. Because counsel for the plaintiffs in that case conceded that you couldn't tell by the act of resignation whether it was voluntary or not, and so you are to require something more.

Now, we come to the problem here, where a class would be asked for which exceeds any class asked for by the parties in the original litigation. If this class is to encompass Miss Evans, it broadens out what anybody has asked for to this point.

Let's play it through. Let's suppose we send this back. And we say, well, Miss McDonald can raise the point now that the court was in error on the class determination; and it decides that it would include somebody like Miss McDonald who was terminated without protest. But it doesn't extend to anybody who resigned without protest. We play through the whole thing again. We get to the same stage. It's all over. Then Miss Evans comes in again, another ten years from now,

and says, well, how about me? That class determination was wrong. This can go on indefinitely.

Simply, it's a practical matter of how to handle the litigation in class suits.

QUESTION: But it's also a little distinction in concept, isn't it, that a motion to intervene -- denial of a motion to intervene is an appealable order under the appropriate provision of 28 U.S.C. So you don't say that the District Court is without power to entertain it. You just say that the District Court ought never to grant it.

MR. BERNSTEIN. Well, we say the District Court didn't grant it, and that the Court of Appeals should have affirmed it. What happened, though, is the District Court said, this matter has been in litigation for five years. Litigation must end. This lady has never saw fit to come in here before. And I must deny the motion.

Now, I think that's very proper for the court to say, after a case has been going on that long, and he has two weeks earlier signed an agreed order of dismissal. That's the circumstance we're in.

Some of the issues I allude to here, if the Court please, were considered in the -- by the 5th Circuit in the Court in the case of Pearson v. Ecological Science Corp. The case arise -- a fraud security case, presenting some of the similar issues, where the class was denied; the settlements

were worked out; and then somebody tried to upset the settlement. In fact, one of the persons who was denied intervention on the grounds of timeliness attempted to intervene and assert her certiorari petition which was pending in this Court to review the power of the Circuit Court to review the denial of class by the District Court. Very confused litigation.

QUESTION: Let me ask you one more question.

MR. BERNSTEIN: Yes, sir.

QUESTION: Suppose you have another hypothetical case, where the effort to intervene is five years after a settlement. And the District Court says no, you can't intervene. Is the proper reason for that decision simply a weighing of timeliness factors under the rule, or is it in fact that there is no case in which to intervene in?

MR. BERNSTEIN: Well, I suppose five years is a different circumstance than intervening within thirty days, during which time there is a statutory appeal period.

QUESTION: You can't appeal until you intervene, can you?

MR. BERNSTEIN: That's correct. That's correct.

QUESTION: So isn't there something to what Judge Pell said about, if she was going to get in, she had to get in by a motion to alter or amend the judgment?

MR. BERNSTEIN: Yes, sir. We obviously agree with

Judge Pell's reasoning, because he agreed with us. And that he says, she should have come in after that, taken appropriate action, and if she wasn't availing she should have appealed then, and we would have been done with this three years ago.

QUESTION: I misunderstand that. You can appeal if you're denied intervention.

MR. BERNSTEIN: Yes, of course, your Honor, of course. That question is not -- the question is what standards of review does the Court of Appeals apply in reviewing the denial of intervention by the District Court. We never challenged the right of the intervenor here, the attempted intervenor, to appeal the denial of intervention. What we did challenge was the notice to appeal the review of class action. Because our position was, until you decided you have the proper intervenor, you haveno party before the Court to properly challenge the classdenial. And the Court of Appeals took that step. But we say the standards that applied in determining that the intervention was timely were improper. We say thatthe time limits had long since run out on this. And that certainly for a District Court to say that you've come in five years after this was started, and three years after I've entered my order, you're too late, is a proper exercise of discretion by the trial judge.

QUESTION: Well, was it clear that intervention must take place before the running of the statute of

limitations on the original cause of action?

MR. BERNSTEIN: In our view, it does. In our view. I think that's -- that's how we read American Pipe. Because in American Pipe, clearly, what the Court said was, you came in timely because you came in on the 8th of 11 -- 8th day, and 11 were left. The clear implication is that if you came on the 12th day, you're too late. Now if --

QUESTION: Whatif the case was on appeal?

MR. BERNSTEIN: Pardon sir?

QUESTION: You can intervene when a case is on appeal.

MR. BERNSTEIN: But then you have a party who is a proper appellant. But the case is already on appeal, then you must already have an appellant. Our point is that if you're not a proper intervenor, then once that is determined, there's no appellant. The main plaintiffs here could not appeal. They had settled the case. I think whether they wanted -- couldn't appeal or didn't want to appeal is a matter of no legal difference. Because it was their case to control.

Once class was denied, the -- Moore says that once the motion to strip the case of its class action status is granted, it's no longer a class action case. That being so, there is no class representative. What the Court of Appeals said was, that until the champion of the class abdicated

the motions were timely. But once class was denied, there was no class anymore. There was no champion.

As we said in our brief, the champion didn't abdicate in '75; the champion was dethroned in '72. There was no class anymore.

What the Court of Appeals in effect says, is that class denial has no meaningful effect in the management of class action litigation. Because -- with whom are you going to settle? You have a group, a finite group. You have intervenors that came in here. We had fifteen people to deal with. We know the paramet of our case. We know what we're subjected to. If we have to go to trial, what are our proof problems, what are our defenses. We know who these people are, because we're talking now only about back pay, because we've already settled the legal issue of liability in the prior litigation.

But you say, well, you got to wait, fellows. You've got to wait until this is all over.

QUESTION: Would your argument here be the same if the respondent had filed an affidavit and said, I didn't know what happened to the litigation?

MR. BERNSTEIN: No, sir, it would be identical -- identical, the same. And that's the issue this Court faced in American Pipe. Should it make a difference that you know or don't know. And what this Court said, the statute

will toll for everybody. We have a uniform, clear rule. Otherwise, how are you going to settle these things? The Court of Appeals test is purely subjective -- a purely subjective one. When did you know? When did you first learn thatthe champion of the cl is going to abdicate? Are we going to have a hearing on that? Did they tell me? Were we in communication? Did I have a duty to communicate? How did I find out? Did I happen to run into the lawyer in the street? How do I know that?

Your rule is a very simple rule: once class is denied, the clock begins to run again. The rule purports by the Court of Appeals is an unmanageable rule. We simply don't know. We have to have another evidentiary hearing on how did we find out. What it says is, that maybe it's timely for some class members but not for others.

QUESTION: It's not an uncontrollable size of class with 20-some people.

MR. BERNSTEIN: Well, that's precisely --

QUESTION: You could have been required to notify them.

MR. BERNSTEIN: Well, there's some question, your Honor: I think counsel disagrees with me as to the size of the class, and we had occasion to comment in our brief about the statements about how large the class really is. The complaint alleged 27 or 28. But he claims that maybe it's as many as

160.

I'd like to reserve the balance of my time.

QUESTION: Let me just ask a question.

MR. BERNSTEIN: Yes, sir.

QUESTION: Does your question present -- in your petition you presented only one question, didn't you? That was the American Pipe question.

MR. BERNSTEIN: Yes, sir.

QUESTION: Is that -- does the question of the timeliness of intervention, is that subsumed in that question?

MR. BERNSTEIN: Yes, sir. I believe it is. Because intervention can only be under Rule 24. And there's no way you can get around that. When you talk about intervention and timeliness, you must be talking about Rule 24. It's either intervention is a matter of right under 24(a) or permissive under 24(b).

QUESTION: That's why you didn't expressly present it.

MR. BERNSTEIN: That's correct. If you will examine our position you will see that we do allude to that precise point.

QUESTION: But there's only the single question.

MR. BERNSTEIN: That's correct. We think it's subsumed within it. We refer to Justice Blackmun's comments in American Pipe about the problem of sleeping on your rights

and using this as a vehicle.

QUESTION: Of course if you're right, Mr. Bernstein, I don't suppose there could ever be any review of the propriety of the class status in that -- because if two or three people had intervened, members of the class had intervened promptly, in a timely fashion, within the 62 days, you would have just settled with them, and then nobody would have appealed.

MR. BERNSTEIN: Not so, sir. If Miss McDonald had--

QUESTION: The way you settled with the original plaintiffs.

MR. BERNSTEIN: May I be heard, sir?

The group that we're talking about are those who were excluded. If they were within the parameters that the judge decided was an appropriate class but failed for numerosity, certainly they could intervene, as the 13 did. But let's suppose it's one of those who was excluded, as Miss McDonald was. Then she comes in and attempts to get the class order modified, which lets in those in her category and her subclass, or she appeals it right then, because it's a final order. Certainly there could be a review.

QUESTION: There can be --

MR. BERNSTEIN: There can be review at that point. If Miss McDonald attempted to intervene within a

timely period, and that intervention was denied by the courts because she didn't come within the parameters of the group that he -- as he defined it, she can appeal that, and the reason for that denial. Certainly.

QUESTION: Well, generally speaking, the grant or the denial of class action is non-appealable.

MR. BERNSTEIN: It's not --

QUESTION: After a final judgment.

MR. BERNSTEIN: Excuse me, sir. It's not appealable by the main parties. But inervenors who are denied -- attempted intervenors who were denied intervention can appeal. And that's what happened in Monarch Asphalt, the case to which we referred.

QUESTION: You can appeal a denial of intervention.

MR. BERNSTEIN: Denial of intervention. But that --

QUESTION: What you oppose, then, is automatically appealing the non-inclusion in the class.

MR. BERNSTEIN: The reasons. The reasons for denial of intervention. You're either -- you're here too late , or you're not part of the class. If it's not part of the class, we have to examine it.

QUESTION: But if you intervene you don't need to be part of a class.

MR. BERNSTEIN: If you intervene, and intervention

is accepted, that is correct. But if you're denied intervention, you appeal the denial of intervention. And if you're denied intervention because you didn't come within the group that the judge thought were permissible to be in the suit, you then have appealed the judge's determination of that question.

QUESTION: Well, what happens to a member of the class who knows there another class and knows there's a lawsuit and, without his knowledge at all, the champion tells the defendant, if you'll give me twice what I ask for, I will not oppose the denial of the class action point.

MR. BERNSTEIN: Sir --

QUESTION: And then the non-champion doesn't hear anything about that. He really gets it, doesn't he?

MR. BERNSTEIN: The fact is that when a class --

QUESTION: How could you stop that?

MR. BERNSTEIN: Yes, sir. May I answer it?

When the class -- when the class action is started, the unnamed people are in the same position. They are relying on what somebody else is going to do. They also, once class is denied, have the obligation to protect their own interests because there's no longer a class vehicle. And the -- the main plaintiffs who remained have no fiduciary obligation to the unnamed class member. The charge of sell-out, sale of appeal rights, was made in the Pearson case, made by the SEC as amicus, and the Court rejected that on the ground

that there's no duty anymore. The class is over. It's up to you to act to protect yourself. Otherwise class litigation will never end. It will go on indefinitely, as in this case it will go on -- it has gone on for five years. It will go on for another five. And as I indicated, somebody else can come in and say, well, you excluded me too. There's simply no end.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Bernstein.

Mr. Meites.

ORAL ARGUMENT OF THOMAS R. MEITES, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. MEITES: Mr. Chief Justice, may it please the Court:

The notion that this case involves American Pipe we think is misplaced. We think that this case involves a very conventional kind of intervention question under rule 24.

American Pipe was a case where the persons excluded by the class ruling determined they wanted to bring individual actions. They brought individual actions. They chose to bring them in Utah, in the same form as American Pipe which was pending.

This Court held in American Pipe that those persons had the benefit of a tolling during the pendency of

the class action, or until the class was adversely determined. And since they filed within eight days of that, they were timely.

But those intervenors took the case as they found it. As far as the records go of the lower court decisions, they were not interested at all in challenging the adverse class ruling. It was by an experienced judge who had handled a number of similar cases. And apparently it seemd to them that those reasons were pretty good.

Instead of taking a chance on a procedural appeal years later, they came into that court and said, we will hazard our luck in that form.

We took just the opposite tack. In this case we relied on the class champions until final judgment was entered. We then learned that they were going to abandon us. At that point, we only had one choice: we had to continue this case through appeal.

That's exactly what we did. We took the case as we found it with whatever inadequacies it might have had as far as timeliness or the measure of remedy that had been determined in earlier phases, and we staked our all on continuing that case through appeal.

QUESTION: Well, you just brought your own lawsuit as individual plaintiffs, didn't you?

MR. MEITES: We never filed our own EEOC charge.

48 QUESTION: But you say --

MR. MEITES: So we could not but for the umbrella --

QUESTION: I see.

MR. MEITES: -- of this case.

Now, I think Mr. Bernstein is correct. I think we only had two days to file it. But even if we had 62, we could have gone into the Northern District of Illinois, paid our $15 and filed our own case. Or we could have tried to intervene in the existing case. We didn't do either of those --

QUESTION: That would have been what the members of the class in American Pipe did?

MR. MEITES: That's right. Mr. Bernstein said that we had to do that. And I submit that that is not compelled by American Pipe --

QUESTION: Well, what you originally said was, you had no choice. You couldn't do that. And I didn't understand --

MR. MEITES: Oh, no, we could have done that.

QUESTION: You said you had no alternative but to do what you actually did in this case.

MR. MEITES: Oh, no. Once we had not done that, once that two days had passed, or the sixty two days had passed, the only thing left for us to do after our class champions abdicated, was to continue this case through appeal. There was no other choice. In December --

QUESTION: After the 62 days had elapsed.

MR. MEITES: That's right.

QUESTION: But that doesn't give you any right; the fact thatyou can't do anything else.

QUESTION: After the statute of limitations had run.

QUESTION: That doesn't give you any right to do something.

MR.MEITES: No, I don't think it confers additional rights because the statutory -- and I'd see it the other way around.

QUESTION: Well, I don't understand why you didn't try to intervene.

MR. MEITES: Well, I think that there are a number of reasons we didn't. First of all, we were represented at that point by the lawyers who had demonstrated their competence to carry this case to its conclusion. They had brought the original Sprogis case, the case on liability. They had attempted to convert that case into a class case. They persuaded the 7th Circuit that that was proper. Unfortunately on remand, the District Court judge decided he wouldn't do it.

The next step they took was to try to get class treatment in this case. When that failed, they attempted to getan interlocutory review from the 7th Circuit. That failed

as wall. At that point, Miss McDonald was represented by lawyers who had lived with this case for four years, who had taken every possible step available to them to represent her interests. And they had given her every indication they would continue to represent her interests through appeal. And of course, that if she had --

QUESTION: Why didn't they do it over four years? Intervene?

MR. MEITES: Through -- until final judgment was entered on October, 1975, she was fully represented by them. If she had intervened — first of all, if she had come to me in December of 1972 and said, Mr. Meites, should I petition to intervene, or should I continue the case as I found it? I would have to advise her to do exactly what she did.

The choice on the one side, where she was competent counsel at no expense to herself, who had given every indication of doing a crackerjack job.

QUESTION: Well, is competent counsel counsel that lets somebody else do the work?

MR. MEITES: No. It's more than that. It's counsel that has demonstrated that they are working for her interests. They brought her into the class action. They took every possible step they could to maintain it as a class action.

Judge Perry had ruled that he would not permit

someone like Miss McDonald to intervene. So if she had tried to intervene in 1972, it would have been denied.

QUESTION: She could have appealed?

MR. MEITES: She could have appealed with the addition --

QUESTION: Which is what you're trying to do now.

MR. MEITES: No, no it's not. If she had appealed in 1972, perhaps the 7th Circuit would have reversed. Perhaps they wouldn't have. They might have found that that ruling, for a number of reasons, was correct as to her.

She would then, I think, be out of the box. And Mr. Bernstein would be arguing today that res adjudicata foreclosed her later action.

Say she succeeded on that appeal. She would have gone back, and Judge Perry would have let her in the case. She would have won, I imagine. But at the end of the case, there's no reason that Mr. Bernstein and his clients would not have been able to settle with her, and she would not be interested in appealing.

QUESTION: If she had sought intervention and had intervened, been permitted to intervene --

MR. MEITES: She wouldn't have been permitted to intervene. Judge Perry -- Judge Perry, in his ruling of December 6th, said he would not permit anyone to intervene

who had not individually protested. She could --

QUESTION: Well, she could have filed a petition to intervene, and had it denied.

MR. MEITES: And then appealed. And if she had done that, she would have been no better off than where she ended up, and where everyone else in this case ended up.

QUESTION: She wouldn't have been any worse off.

MR. MEITES: Oh, yes she would have. The case would have been delayed --

QUESTION: Well, how can she be any worse off than not getting anything?

MR. MEITES: No. She would have received relief.

QUESTION: I mean I -- what's worse than that?

MR. MEITES: The delay for her to get that relief. In December, 1972, the 7th Circuit had approximately a two year backlog in hearing oral arguments. If she had filed that petition to intervene, I suggest that the defendants would have stayed the main case pending the appeal. Because, the intervention appeal might have changed the dimensions of the case in the trial court. Two years would have been wasted, where not one stewardess would have been able to go back to work, go flying.

QUESTION: Am I to say -- you say that the client you now represent, then, was actually represented by the

Romeesentative

MR. METTES: Only in the sense that every absent class member is represented by the main plaintiffs and their attorney. Not -- there was no direct representation.

QUESTION: No formal engagement.

MR. METTES: That's correct.

QUESTION: I would think otherwise she might certainly have a claim against --

MR. METTES: No, there isn't. I meant only to suggest that she and everyone else were represented by these people who were working as hard as they were on her behalf, attempting to get class treatment.

The rule that United advocates would compel every single excluded class member to walk into a District Court. Everyone has to press their own claims within two days or sixty two days or be foreclosed. This would effectively mean that when the case was over, the adverse class ruling would have been shielded from review.

There's no real suggestion that someone seriously wants 5,000 people in a large case to walk in, file their individual petitions to intervene with their individual attorneys. But if you adopt a rule supposedly compelled by American Pipe, I don't see how you can avoid that result.

We don't advocate any new rule at all. I think all we see this case involves is applying the rule this Court announced in NAACP v. New York, that timeliness is determined

from all the circumstances.

The single most important circumstance here is not that the case took two years, or five years, or seven years. That is largely because the 7th Circuit does not permit interlocutory appeals of adverse class rulings.

QUESTION: But you're assuming that the application to intervene took place before the entry of a final judgment, when you revert to NAACP v. New York, aren't you? It seems to me you put your intervenor in a little more favorable position than you do your party when you say that when a party gets a judgment on the merits, part of which he likes and part of which he doesn't, he has thirty days, no ifs,ands or buts, to appeal the disadvantageous part to the Court of Appeals.

You're saying, in effect, that an intervenor who is in the same position as that party can come in five years later and under kind of a flexible timeliness standard, get appeal to the Court of Appeals on that same kind of issue.

MR. MEITES: No, I don't think I'm saying that. We filed our notice of appeal within thirty days of the entry in the final judgment. Our filing a notice of appeal did not slow this case down one jot. Admittedly, we appealed, not the named plaintiffs. But we did not file five years after final judgment. We filed 18 days after final judgment. We filed within the original thirty days -- before the thirty

days for the plaintiffs to appeal would have expired. If we had come in five years later, in 1982, I imagine that I'd have a very difficult time persuading you that I was not out of time.

QUESTION: But you say that even if you had come in five years later, you would not be barred by the thirty days --

MR. MEITES: I don't know. I had a very real problem when I was preparing the papers for theintervention. I was concerned that Judge Perry would not decide our petition to intervene within thirty days. And I frankly didn't know whether I could go ahead and file a notice of appeal before my petition to intervene was decided.

Well, fortunately, he decided the day I filed it. And I filed my notice of appeal and the petition the next day.

The question you're raising is a difficult question. It's not, because of the way this case was resolved, posed by this case.

I think that Mr. Bernstein's argument turns ultimately on a -- the Court being asked to put on a set of blinders. So it's only to one factor, the fact of when mechanically a statute limitations applying to an individual action might run.

I think --

QUESTION: But doesn't it really come down to -- let's put it this way: American Pipe was concerned with the question of what tolling effect, if any, the pendency of a alleged class action that was later not certified as a class action had upon the -- what tolling effect it had upon the statute of limitations. That was the question in American Pipe.

Here, isn't the first question to be asked is whether or not intervention has to take place within the period provided by the statute of limitations.

MR. MEITES: All right.

QUESTION: And does it or doesn't it? Rule 24 just says timely.

MR. MEITES: Rule 24 does not answer that.

QUESTION: It says, timely, doesn't it?

MR. MEITES: And I suggest that the answer is, when the intervention is not for purposes of pressing an individual case --

QUESTION: an individual plaintiff's case.

MR. MEITES: -- but for the purpose of taking the case as you find it and continuing it through appellate review of the class determination, the answer is, no. The statute of limitations really has nothing to do with it.

QUESTION: Is there any law on this?

MR. MEITES: As far as I can tell --

QUESTION: Because, this it seems to me, is the preliminary --

MR. MEITES: As far as I can tell --

QUESTION: -- maybe the dispositive question.

MR. MEITES: -- in all the timeliness of intervention cases, the statute qf limitations plays virtually no role.

QUESTION: That's what I had thought. It did in American Pipe because these were -- these unnamed class people who were held not to be a class, because the class was not too numerous, came in as original plaintiffs. And they virtually conceded that they had to come in within the period -- within the limitations period. And the question was how much of thatperiod had been tolled?

That was the only question.

MR. MEITES: That's correct.

QUESTION: And they -- as I say, as I emember in that case, it was conceded that they had to come in within the limitations period as original plaintiffs. But is it generally true that there has to be intervention within the appropriate limitations period?

MR. MEITES: No, I -- there are a number of them actually come fromthe D.C. Circuit where intervention after judgment has been allowed.

QUESTION: Well, it could be after judgment but

still wtihin the limitations period.

MR. MEITES: No. Inasfar as my reading of those cases go, there is never a discussion of the statute of limitations. All I can --

QUESTION: Well, I don't remember much discussion either.

MR. MEITES: So all I can -- so all I can conclude is that until this case, no one has suggested that timeliness in Rule 24 means, as defined by a statute of limitations that may or may not have run.

QUESTION: Yes.

MR. MEITES: As to an individual action.

QUESTION: Isn't that really the first question to ask in this case?

MR. MEITES: I think it is. I think thatthat distinguishes -- not distinguishes; American Pipe needn't be dintinguished; it's about a different kind of situation. I don't think this Court's been faced, until this case, with an intervention after judgment case. I don't think -- but I don't think it presents anything radically new. I think it's a timeliness case under NAACP v. New York.

QUESTION: Rule 24 just says timely.

MR. MEITES: That's right. And as construed by this Court, that means you look at all the circumstances, and you ask yourself, did the intervenor act reasonably.

In this case, the 7th Circuit found first of all that she acted as soon as her class champions had indicated to her that they would no longer continue to advance her interests.

Secondly, they concluded that there was no prejudice to United . United knew -- or at least they should have known, since this case was filed, that it faced a substantial exposure to a great number of people. It had decided to run its airline on a policy of having unmarried stewardesses. It took a risk. The law was changed. For three years after that law was changed, it persisted in its policy.

It's a mature business corporation, and if it lost, it lost.

When the suit was filed, I think it had no doubt that it faced a substantial exposure. The only difference about this case is that the appeal was prosecuted not by Romasanta but by McDonald. There's no other difference, as far as I can see, in where we are today.

The second point that Mr. Berbstein made which troubled me is the notion that somehow what we did will impede settlement; that somehow it's only possible for defendants to settle these cases if they can buy off the right of appeal.

Well I suggest to this Court that that's not the kind of settlement that should be encouraged on any kind of

case, and certainly not in Title VII, where Congress has made clear, and this Court has made clear, every effort should be made to accord class-wide relief. And in fact in this case the main plaintiffs in no way sold out their right to appeal. There's not one word in the settlement agreement that they promised not to appeal. The usual way you handle this, I'm informed, is you hold up paying out the money until 31 days have expired. In this case, they paid all the money over before.

QUESTION: You mean if a plaintiff and a defendant agree, enter into a settlement agreement and stipulate that the complaint can be dismissed, or that, in the Northern District of Illinois, the plaintiff can appeal from that?

MR. MEITES: I think that that -- the defendant could perhaps move to dismiss on the grounds of breach of contract, or lack of standing to prosecute the appeal. That's an interesting case. I don't know of any instance where that's been done.

QUESTION: Well, I've never heard anybody suggest it, that someone who has settled and entered into a stipulation for dismissal of his complaint, upon receipt of a sum of money, and gets that sum of money, could appeal.

MR. MEITES: Well, it could be done. I imagine it would be subject to a motion to dismiss which would succeed.

But in this case, it was not done. There was not one word in writing or in fact in which these main plaintiffs said we will not prosecute an appeal for the absent class members. I can't imagine any attorney every agreeing to that. And if he did, he'd be a fool to put it in writing.

QUESTION: But they didn't.

MR. MEITES: Sir?

QUESTION: But the fact is, they did not.

MR. MEITES: They decided after final judgment not to appeal.

QUESTION: Well, isn't that all that's necessary?

MR. MEITES: For -- as far as their right to prosecute the appeal? It ended it. But I don't think that their decision ended our opportunity to complete this case, to bring this case to a conclusion.

QUESTION: Well, whose that? The class?

MR. MEITES: On behalf of the class.

QUESTION: Well, according to Mr. Bernstein, the class doesn't exist anymore.

MR. MEITES: Well, and I can say to him that the class exists now, because the 7th Circuit ruled it did. It's a metaphysical discussion, I think, to say that for three years -- there was a class originally, and for three years it ceased to exist, and now it's back again.

I think the only way to look at it --

QUESTION: Well, the only reason it's back again is because you put it back. They're not putting it back.

MR. MEITES: Well, they wouldn't want it back.

QUESTION: That's the last thing they want.

MR. MEITES: But I think the only way to look at it, once the 7th Circuit has ruled -- it's, I suppose, a nunc pro tunc order -- we're back as if the ruling hadn't been made, the earliest ruling hadn't been made in the first place.

I suppose that if you look at this kind of case over the course of a decade, from 1968 to 1977 you wonder if there isn't a better way of handling this. And I suppose there must be. Because I don't think a case should go on this long.

But if you look at each step along the line, I think you can explain why it happened that ten years after the cause of action arose, we're still in a court. And we're a long way from a remedy.

But I suggest that none of those reasons are sufficient to hold that the people who were injured by United Airlines wrongdoing should never get appellate review of an erroneous class order, and they should never get the relief that it seems to me they've been entitled to for the last decade.

It's not our fault that we're here today. It's not our fault that we were fired. I don't think it's anybody's fault. I think that all the Court need find, as

the 7th Circuit did, is, we have acted reasonably in light of what we knew, and in light of what the law said we should do.

And I suggest the decision below should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, the case in the above-entitled matter was submitted.]